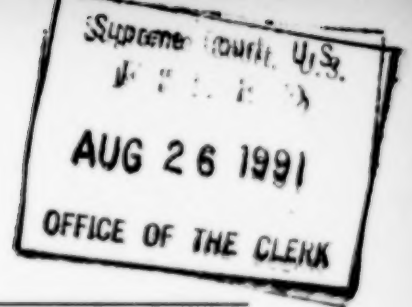


No. 91-126



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In The  
**Supreme Court of the United States**  
October Term, 1991

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HOWARD WYATT,

*Petitioner,*

versus

BILL COLE and JOHN ROBBINS, II

*Respondents.*

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Petition For  
Writ Of Certiorari To The United States  
Court Of Appeals For The Fifth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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August 26, 1991

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STATEMENT OF THE CASE

Respondents Robbins and Cole would refer the Court to *Wyatt v. Cole, et al*, No. 90-1058 (5th Cir. Apr. 17, 1991), attached as Appendix "A" to Petition for Certiorari, for a detailed description of the facts of the case as found by the United States Court of Appeals for the Fifth Circuit.

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ARGUMENT IN OPPOSITION  
TO GRANTING OF WRIT

THIS COURT SHOULD NOT GRANT THE WRIT SINCE THE FIFTH CIRCUIT'S DECISION IS BETTER REASONED THAN CONTRARY DECISIONS FROM OTHER CIRCUITS.

At the onset it should be pointed out that the Petitioner has not appealed the lower courts' findings that

the Defendant officials correctly asserted good faith immunity under the facts in the case nor that no governmental entity is liable under the facts in the case. *Petition For Writ of Certiorari*, at 4, n. 1.

Consistent with precepts of recognized immunity doctrines it cannot be denied that if public officials using a presumptively valid statute are determined to be qualifiedly immune, then private individuals, considered to be acting under color of state law and using a presumptively valid statute are equally entitled to assert such an immunity. It is the Petitioner's contention that immunity for private individuals is not recognized within the interpretation of 42 U.S.C. § 1983 or the common law; however, several federal courts, as well as the Supreme Court of Mississippi, have correctly acknowledged the existence of an immunity for private individuals acting under color of state law.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court determined that private actors who invoke a presumptively valid statute were "state actors" under 42 U.S.C. § 1983. Although this Court reserved the question of whether such defendants are entitled to qualified immunity, it appears that the question was viewed in terms of a choice between providing such defendants with a good faith defense or incorporating an element of bad faith in a plaintiff's claims. The language of the opinion seems to express a preference in favor of establishing good faith immunity as a defense for private actors. *Id.* at 942 n.23. As recognized in *Wyatt, supra*, in addition to the Fifth Circuit, the Eighth, Tenth and Eleventh Circuits have granted qualified immunity to private individuals. *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983);

*DeVargas v. Mason and Hanger-Silas Mason Co., Inc.*, 844 F.2d 714 (10th Cir. 1988); and *Jones v. Preuit & Mauldin*, 808 F.2d 1435 (11th Cir. 1987) (All post-Lugar opinions).

In *Underwood v. Foremost Financial Services*, 563 So.2d 1387 (Miss. 1990), the Supreme Court of Mississippi in examining the application of qualified good faith immunity to private defendants acting under color of state law, did not even imply that those defendants who are sued under color of state law for an alleged deprivation of constitutional rights were not entitled to assert qualified immunity but rather addressed only whether the facts indicated that the private defendants acted within the immunity provided. Clearly the court in *Underwood* acted as if the existence of good faith immunity for public defendants sued under Section 1983 was equally applicable to private defendants.

As stated in *Folsom Inv. Co., Inc. v. Moore*, 681 F. 2d 1032, 1035 (5th Cir. 1982):

When a citizen undertakes in good faith to utilize a proceeding at law provided by his state legislature, he should do so with confidence that he need not fear liability resulting from the legislature's constitutional error of which he was unaware. Indeed, our system encourages citizens to employ existing lawful mechanisms to resolve their claims and disputes. What we encourage we ought not seek to punish. In the same way we wish to encourage citizens to undertake public service, so must we encourage them to settle their differences and assert their claimed rights through the employment of legal mechanisms which they believe, in good faith are constitutional.

Robbins and Cole submit that the decisions of the District Court, the United States Court of Appeals for the Fifth Circuit and the Supreme Court of Mississippi acknowledging the existence of a good faith qualified immunity for private defendants, alleged to be acting under color of state law and using a presumptively valid statute, are consistent with the better reasoned opinions of the Eighth, Tenth and Eleventh Circuits.

The Petitioner would have this Court find that private defendants held to the standard of public officials and acting with public officials are not entitled to assert the same defenses and immunities as those public officials. Due process, equal protection and equity necessarily require a contrary result.

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### CONCLUSION

For these reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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